Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

WALID KHALIFE, FRED ABDENOUR, GOLDCORP, INC.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER AN AGREEMENT WHICH HAS AS ITS SOLE ALLEGED PURPOSE CONDUCT WHICH VIOLATES A SPECIFIC FEDERAL STATUTE (IN THIS CASE, THE "ANTISTRUCTURING" PROVISIONS OF 31 U.S.C. §§ 5322 AND 5324), BUT WHICH CANNOT BE PROSECUTED AS A "CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE UNITED STATES," BECAUSE THE GOVERNMENT CANNOT PROVE THAT THE PARTIES TO THE AGREEMENT HAD THE CRIMINAL INTENT REQUIRED BY THE STATUTE (IN THIS CASE, KNOWLEDGE OF ILLEGALITY, OR "WILLFULNESS"), CAN NONETHELESS BE PROSECUTED AS A "CONSPIRACY TO DEFRAUD THE UNITED STATES."

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CITATIONS OF THE DECISIONS BELOW

The opinion of the District Court, granting petitioners' motion to dismiss Count II of the Indictment, is unpublished.

The decision of the Sixth Circuit Court of Appeals, reversing the District Court, is published; its citation is *United States v. Khalife*, 106 F.3d 1300 (6th Cir. 1997).

BASIS OF JURISDICTION IN THIS COURT

The Sixth Circuit Court of Appeals filed its opinion reversing the District Court's pre-trial dismissal order on February 14, 1997, and denied petitioners' timely filed petition for rehearing with suggestion for rehearing en banc by order entered April 24, 1997.

This Court has jurisdiction to review the decision of the Sixth Circuit on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

Goldcorp, Inc. is a wholesale jewelry business located in Oak Park, Michigan, owned by petitioners Walid Khalife and Fred Abdenour, and Fadi Khalife. On November 1, 1994, the petitioners, along with three other individuals, Fadi Khalife, Rashid Elia, and Jamal Khalife, and Jamal Khalife's business, Khalife Brothers, were charged in a 25 count indictment. On March 13, 1995, the government obtained a second superseding indictment.

The charges relevant to this petition concerned the defendants' alleged "structuring" of bank deposits in amounts less than $10,000, so as not to trigger the filing of Currency Transaction Reports ("CTR's") by the financial institutions to which the deposits were made, which would otherwise be required by 31 U.S.C. § 5313.

Count I of the Indictment alleged a violation of the "offense clause" of the general conspiracy statute, 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. §§ 1001 and 2(b). Count I of the Indictment alleged that by causing the bank to not file the reports, the indictment alleged, the defendants did "knowingly and willfully cause to be concealed and covered-up by trick, scheme, and device, material facts in a matter within the jurisdiction of the Internal Revenue Service."

Count II of the Indictment alleged that the same conduct constituted a conspiracy to defraud the United States, in violation of the "defraud clause" of § 371. Count II reads in full as follows:

> From approximately January 4, 1988, continuing to approximately November 5, 1991, in the Eastern District of Michigan, Southern Division, the defendants, WALID KHALIFE, FADI KHALIFE, FRED ABDENOUR, RASHID ELIA, and GOLDCORP, INC. did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other, and with other persons known and unknown to the Grand Jury, to defraud the United States and the Department of Treasury, Internal Revenue Service, an agency of the United States, by impairing, obstructing and defeating its lawful governmental function of collecting data and reports of currency transaction in excess of $10,000.
>
> *MANNER AND MEANS*
>
> It was a part of the conspiracy that the defendants would, by deceit, craft, trickery and dishonest means, defraud the United States by interfering with and obstructing the lawful governmental functions of the Internal Revenue Service, in that the defendants would cause to be deposited and did deposit currency into the account of GOLDCORP, INC., at different branches of the same bank and at different banks in amounts less than $10,000 to disguise the fact that the total amount of currency being deposited on a given day exceeded $10,000 so that the banks would not report the cash deposits to the Internal Revenue Service.

OVERT ACTS

In furtherance of the conspiracy and to achieve the objects thereof, the defendants and their co-conspirators committed and caused to be committed certain overt acts, among others. Those overt acts are identified in Count One of this indictment[1] and are incorporated by reference herein. In addition, the defendants and conspirators caused to be deposited and did deposit cash in amounts less than $10,000 at different banks on the same day. Those banks included Comerica Bank, First Federal Savings Bank and Trust, and First of America – Southeast Michigan.

In violation of Title 18, United States Code, Section 371.

It is to be noted that Count II alleges no actions other than the deposits of Goldcorp funds into Goldcorp's own bank accounts. And the government acknowledged early on that "although the evidence establishes the fact that the defendants engaged in this scheme so that the banks would not file currency transaction reports with the IRS, *we do not have evidence that they knew that, by so doing, they were engaging in illegal conduct.*" (Letter from Assistant United States Attorney Robert P. Cares to undersigned counsel, February 9, 1995) (emphasis added).[2]

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[1] The overt acts listed in Count I consist of itemized bank deposits of less than $10,000.

[2] This letter from the government was attached to Defendants' joint motion to dismiss, discussed *infra*.

Thus, the government admittedly could not have proven a violation of the substantive "structuring" provisions defined in 31 U.S.C. §§ 5322 and 5324, as interpreted by this Court in *Ratzlaf v. United States*, 510 U.S. 135 (1994).[3]

On March 1, 1995, petitioners and co-defendants Fadi Khalife and Rashid Elia filed a joint motion to dismiss, pursuant to Fed. R. Crim. P. 12(b). The theory of the motion was that, because the object of the alleged conspiracy was within the precise ambit of this Court's decision in *Ratzlaf*, the government could not be permitted to "end-run" around the knowledge requirement imposed by that decision, and must be required to prove "*Ratzlaf* intent," no matter how artfully the charge was framed. Admittedly, of course, the government could not meet such an evidentiary burden. Alternatively, relying on the Sixth Circuit's decision in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989),[4] petitioners argued that their

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[3] While Congress thereafter amended the "structuring" statutes to eliminate the need to prove that a defendant knew that his structuring activities were illegal, see Pub. L. No. 103-325, 108 Stat. 2160, Title IV, § 401 (Sept. 23, 1994) and 31 U.S.C. §§ 5322 and 5324, the conduct here at issue occurred prior to both *Ratzlaf* and its statutory nullification.

[4] *Minarik* involved a delinquent taxpayer's attempts to liquidate assets and deposit the resulting cash without alerting the IRS. The Sixth Circuit, while recognizing that § 371 "creates *one* crime that may be committed in *one of two* alternate ways," 875 F.2d at 1193 (emphasis in original), the court held that a prosecutor's charging discretion was limited where a specific statute "creates and defines" a defendant's primary legal duties

conduct, which was specifically addressed by a specific statute, could only be charged under the "offense clause" of § 371.

Before the motion was heard by the District Court, the parties entered into plea agreements. Petitioners Walid Khalife and Fred Abdenour agreed to plead guilty to Count II, reserving their right to litigate the propriety of the charge. Petitioner Goldcorp and the government reached a settlement agreement contingent upon the guilty pleas of the other defendants.

On June 27, 1995, the District Court issued an opinion granting petitioners' joint motion to dismiss Count II, on the basis that, because the conduct of the petitioners fell within the range of actions closely addressed by a particular statute, 31 U.S.C. §§ 5322 and 5324, such conduct could only be charged under the "offense" prong of § 371,

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in an area where a citizen's duties may not be immediately apparent:

> But where the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause. The conspiracy is still an indictable offense under the first clause of § 371. But compliance with our rule today will mean that prosecutors and courts are required to determine and acknowledge exactly what the alleged crime is. They may not allow the facts to define the crime through hindsight after the case is over.

Minarik, 875 F.2d at 1196.

under the rule announced in *United States v. Minarik, supra*. The trial court, however, rejected petitioners' argument that *Ratzlaf* intent had to be proven in a prosecution under the "defraud clause."

The government appealed to the Sixth Circuit Court of Appeals. Under the plea agreements, if the District Court's dismissal of Count II is reversed, petitioners Walid Khalife and Fred Abdenour will plead guilty to that count in exchange for the dismissal of all other counts. If, however, the District Court's dismissal of Count II is upheld, the government will dismiss all charges against those two defendants.

On February 14, 1997, a panel of the Sixth Circuit unanimously reversed the District Court's dismissal, distinguishing its previous decision in *Minarik*, and upheld the District Court's conclusion that in a prosecution under the "defraud clause," *Ratzlaf* intent need not be proven. A timely filed petition for rehearing and suggestion of appropriateness of rehearing en banc was denied on April 24, 1997.

Petitioners now seek a writ of *certiorari* from this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH BETTER REASONED DECISIONS FROM OTHER CIRCUITS, AND THE COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS.

The case at bar presents a clearly drawn conflict between the Circuits which may, at first blush, appear to be of only limited significance, but is actually one of potentially great importance.

In the court below, petitioners relied on two cases from the Third Circuit, *United States v. Alston*, 77 F.3d 713 (3d Cir. 1996), and *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994), both of which would foreclose the instant prosecution in light of the government's inability to prove *Ratzlaf* intent. The government relied on a case from the Seventh Circuit, *United States v. Jackson*, 33 F.3d 866 (7th Cir. 1994), which holds to the contrary.

The Sixth Circuit acknowledged the conflict between these decisions, and chose to follow the Seventh Circuit:

> In *Jackson*, the defendants conspired to defraud the United States by impeding the lawful functions of the IRS. *Id.* at 867. The *Jackson* court acknowledged that the *Ratzlaf* decision involved the interpretation of the term, "willfully," found in 31 U.S.C. § 5322(a). Because § 371 contained no language connoting "willfully," the *Jackson* court held that *Ratzlaf* intent was not an element of a § 371 conspiracy to defraud. *Id.* at 871. The *Jackson* court then set forth the elements of a § 371 conspiracy to defraud including the proper mens rea:

> (1) an agreement to accomplish an illegal objective against the United States;
>
> (2) one or more overt acts in furtherance of the illegal purpose; and
>
> (3) the intent to commit the substantive offense, i.e., to defraud the United States.

Id. at 872. Ultimately, the *Jackson* court held:

> A conviction under § 371, therefore, does not require that the government prove a violation of a separate substantive statute. *Id.* at 1312; *accord United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993) (stating that under § 371 "[n]either the conspiracy's goal nor the means used to achieve it need to be independently illegal"); *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988) (stating that "section 371's ban on conspiracies to defraud need not involve the violation of a separate statute"), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989).

Id. at 870. The *Jackson* court's holding is logical because there is no "substantive" offense underlying a § 371 conspiracy to defraud. Thus, it is unnecessary to refer to any substantive offense when charging a § 371 conspiracy to defraud, and it is also unnecessary to prove the elements of a related substantive offense.

Khalife, 106 F.3d at 1303.

The Sixth Circuit made no attempt to distinguish the Third Circuit decisions, or to avoid the impact of the proposition that is central to them: that "[t]he essence of

conspiracy is an agreement to commit an act that is illegal." *United States v. Curran, supra,* 20 F.3d at 571.

This Court should grant *certiorari* to settle this conflict, and should resolve the issue by vindicating the Third Circuit's view, which is far more consistent with the general principles of criminal responsibility that emerge from a reasoned examination of this Court's decisions.

In *United States v. Alston, supra,* the Third Circuit explained its decision in *United States v. Curran, supra,* as follows:

> The defendant in *Curran* had asked his employees to make individual contributions to the election campaigns of certain candidates for federal office. He then reimbursed them in cash, thereby circumventing the maximum campaign contributions permitted to any individual under federal law. Following trial, Curran was convicted on charges of causing election campaign treasurers to submit false reports to the Federal Election Commission (the "FEC"), in violation of 18 U.S.C. § 2(b) and § 1001, and of conspiracy to defraud the United States under § 371.
>
> Like the antistructuring statutes, § 1001 punishes only "willful" conduct. We held that "willfully" causing a violation of the disclosure obligations under the Federal Campaign Act, was no different than "willfully" causing the failure by a bank to file a CTR under the Bank Secrecy Act. *Curran,* 20 F.3d at 568-69. Thus, applying *Ratzlaf,* we defined "willfulness" in cases brought under § 2(b) and § 1001 in the Federal Election law context to require the prosecution to prove "that defendant knew of the

> treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful." *Curran*, 20 F.3d at 569.
>
> Because the *Curran* court's "willfulness" instruction was legally deficient in that it did not charge the jury that Curran had to have knowledge of the illegality of his actions, we vacated Curran's convictions on the substantive counts, 18 U.S.C. § 2(b) and 18 U.S.C. § 1001. Most significantly, however, we vacated Curran's § 371 "conspiracy to defraud" conviction because critical aspects of Curran's *mens rea* were lacking, including proof that he knew his actions to be illegal.

Alston, 77 F.3d at 719 (footnote omitted).

With respect to the logic of its resolution of the *mens rea* issue, the *Curran* court's logic is unimpeachable:

> The essence of conspiracy is an agreement to commit an act that is illegal. If a jury is misled into considering as unlawful the omission of an act that the defendant is under no duty to perform, then a finding of conspiracy based on such conduct cannot stand.

Curran, 20 F.3d at 571.

The *Alston* court applied this logic in a proceeding which was factually and analytically identical to the case at bar, and the only actions alleged in support of a "defraud clause" prosecution were acts of "structuring."

The Third Circuit held that, since the purpose of the agreement charged was limited to "structuring," a conspiracy prosecution cannot stand absent a showing of the

kind of *mens rea* which would make the accomplishment of the objective of the agreement unlawful. In doing so, the court simply examined the nature of the charges:

> The indictment, in charging conspiracy to defraud, asserts only that Alston impaired the United States and Treasury "in its lawful governmental function of collecting data and reports of currency transactions in excess of $10,000," language that sounds in structuring. Indeed, the entire indictment speaks only to structuring activities and contains no allegations that Alston defrauded the government in any other respect. Because the indictment is narrowly drawn to rest solely on the alleged facts of structuring, and because it is conceded that Alston lacked the requisite mental state to be guilty of structuring, Alston's conviction on unspecified broader grounds cannot be sustained. . . .
>
> * * *
>
> . . . Although we do not foreclose the possibility of convicting a defendant under § 371's "defraud" clause based on charges *in addition to* or *different from* pre-1994 acts of structuring, as we have just discussed, the present indictment, under paragraph 7(a), charged no more or less than a straight-out structuring conspiracy.
>
> * * *
>
> Because, in the present case, the charge against Alston for "conspiracy to defraud" was nothing more than a charge of conspiracy to structure, we will reverse Alston's conviction where his conviction was not based on proof that he had "willfully" structured, as required

> under *Ratzlaf*. Where either Congress or the Supreme Court has spoken on the required level of *mens rea* required to obtain a conviction for structuring, the government may not subvert that mandate by juggling the "defraud" and "offense" clauses of § 371 so as to substitute one for the other.
>
> If the "offense" clause of § 371 specifically covers an act or offense and the indictment charges only that act or offense as having been committed, and the proofs at trial reveal no more than such acts of offense, a defendant not guilty under the "offense" clause cannot alternatively be convicted under the broad "defraud" clause of § 371.

Alston, 77 F.3d at 720-721 (emphasis in original).

The logic and fairness of this approach, which looks beyond the mere form of the charges to the nature of the conduct upon which the charges are based, is evident, but was ignored by the Sixth Circuit in the case at bar. Moreover, the Third Circuit's approach is in harmony with this Court's analysis of a similar challenge in *Dennis v. United States*, 384 U.S. 855, 864 (1966), which upheld a "defraud clause" prosecution on the basis that prosecution under that clause, rather than the "offense clause," was proper because it "properly reflects the essence of the alleged offense." See discussion, *infra* at page 18.

The Third Circuit's approach is also consistent with the well-accepted view that the two clauses of § 371 define but a single offense, which may be committed in two ways. *See, e.g., Dennis v. United States, supra*, 384 U.S. at 863 (referring to them as "alternative clause[s]"); *United States v. Hauck*, 980 F.2d 611, 615 (10th Cir. 1992);

United States v. Bilzerian, 926 F.2d 1285, 1301-02 (2d Cir. 1991); *United States v. Smith*, 891 F.2d 703, 711-13 (9th Cir. 1989), *amended*, 906 F.2d 385 (1990); *United States v. Minarik, supra*, 875 F.2d at 1193; *May v. United States*, 175 F.2d 994 (D.C.Cir. 1949); *but see United States v. Haga*, 821 F.2d 1036 (5th Cir. 1987).

Given the fact that but a single offense is involved, it is not surprising that nothing in the case law suggests that a different *level* of criminal intent applies to "offense" and "defraud" clause prosecutions. Nonetheless, that is precisely the effect of the Sixth Circuit decision in the case at bar – that acts of "structuring" prosecuted under the "offense clause" require a showing of "willfulness," as defined by *Ratzlaf*, and acts of "structuring" prosecuted under the "defraud clause" do not. The Third Circuit approach, of course, avoids this anomaly by defining the *mens rea* requirement on the basis of the alleged offense conduct, rather than on the basis of which prong of the statute the government has chosen to identify in the indictment.

It might seem that the conflict presented here is of only limited practical significance, since Congress amended the anti-structuring statute to eliminate the knowledge-of-illegality requirement. The issue, however, will arise in any context in which there is a heightened *mens rea* requirement that the government wishes to avoid. *See, e.g., Cheek v. United States*, 498 U.S. 192 (1991) (willful tax evasion requires proof of knowledge-of-illegality); *Liparota v. United States*, 471 U.S. 419 (1985) (food stamp fraud requires proof that defendant knew his conduct was unauthorized by statute or regulations); *Hanlester Network v. Shalala*, 51 F.3d 1390, 1420 (9th Cir. 1995)

(adopting *Ratzlaf mens rea* standard in context of Medicare anti-kickback statute); *United States v. Curran, supra* (adopting *Ratzlaf mens rea* standard to 18 U.S.C. § 2(b) in context of causing false election campaign reports).

In each of the above instances, the government, under the rationale of the decision below, could circumvent the heightened *mens rea* by simply charging a conspiracy to defraud the United States under § 371. In order to correct the wrong that has been done to petitioners in the case at bar, and to foreclose the untoward extension of criminal liability to the host of circumstances in which the decision below invites it, the Court should grant *certiorari* in the case at bar, and resolve the conflict between the circuits by rejecting the result reached by the Sixth Circuit, and endorsing the better reasoned approach of the Third Circuit, as exemplified in *United States v. Alston, supra,* and *United States v. Curran, supra.*

II. THE DECISION BELOW INVITES PROSECUTORIAL OVERREACHING AND "SLEIGHT OF HAND," AND IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT, AND THE COURT SHOULD GRANT *CERTIORARI* TO REINFORCE APPROPRIATE LIMITS ON PROSECUTORIAL ATTEMPTS TO OVERCOME BARRIERS TO PROSECUTION BY RECASTING CHARGES IN "CONSPIRACY TO DEFRAUD" TERMS.

The decisions of this Court do not support the use of the words "conspiracy to defraud" as a talisman to defeat the requirement of specific criminal intent. To the contrary, the Court has long recognized the potential for

prosecutorial over-artfulness which may be found in the expansive nature of the "defraud clause."

In *Bridges v. United States*, 346 U.S. 209 (1953), the Court held that an indictment based on an agreement which had as its purpose the making of false statements in naturalization proceedings could not be charged (or construed) as a conspiracy to defraud, so as to take advantage of a then-expired extension of the statute of limitations (The Wartime Suspension of Limitations Act) applicable to fraud offenses:

> The Government contends that the General Conspiracy Act under which Count I is laid comprises two classes of conspiracies: (1) 'to commit any offense against the United States' and (2) 'to defraud the United States in any manner or for any purpose'. It urges that the indictment here charges a conspiracy to defraud the United States under the second clause. It suggests that, under that clause, proof of a specific intent to defraud is an essential ingredient of the offense and thus brings Count I within the Suspension Act. The fallacy in that argument is that, while the indictment may be framed in the language of the second clause, both it and the proof to support it rely solely on the fact of a conspiracy to commit the substantive offenses violating § 346(a)(1) or § 346(a)(5) as charged in Counts II and III. Count I actually charges that petitioner conspired to 'defraud the United States' only by causing the commission of the identical offenses charged in Counts II and III. The use in Count I of language copied from the second clause of the conspiracy statute *merely cloaks a factual charge* of conspiring to cause, or

> knowingly to aid, Bridges to make a false statement under oath in his naturalization proceeding, or to obtain by false statements a Certificate of Naturalization to which he was not entitled.

Bridges, 346 U.S. at 223-224 (footnote omitted) (emphasis added).

The characterization of the government's attempt in *Bridges* to revive a doomed prosecution by "cloaking" the charges in the mantle of the "defraud clause" has particular resonance in the case at bar. The lessons to be learned from *Bridges* are two. First, in evaluating the nature of a conspiracy charge, a court should look to the nature of the conduct out of which the charge arises, and the purpose envisioned by the agreement. Second, the government cannot gain a tactical advantage by resorting to the "defraud clause," when to do so exalts form over substance.

The Court's reading of *Bridges* in *Dennis v. United States, supra,* is consistent with these admonitions:

> The indictment in *Bridges* charged both the filing of false statements and a conspiracy to defraud, in order to obtain a certificate of naturalization. The Court held that the Suspension Act did not apply to these offenses. The Act, the Court ruled, was to be construed narrowly and to be applied 'only where the fraud is of a pecuniary nature or at least of a nature concerning property.' 346 U.S., at 215, 73 S.Ct., at 1059. The Court characterized the charge that Bridges and his collaborators had conspired to defraud the United States as a 'cloak,' the sole purpose of which was to revive a stale prosecution.

> In the present case, on the other hand, the allegation as to conspiracy to defraud, as we have discussed, properly reflects the essence of the alleged offense. It does not involve an attempt by prosecutorial sleight of hand to overcome a time bar. The fact that the events include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of s 371 unavailable to the prosecution. *Cf. Glasser v. United States*, 315 U.S. 60, 66 – 67, 62 S.Ct. 457, 463 – 464, 86 L.Ed. 680; *United States v. Manton*, 107 F.2d 834, 839 (C.A.2d Cir. 1939) *cert. denied*, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed. 1012.

Dennis, 384 U.S. at 863-864 (footnotes omitted).

In contrast, the charge in the case at bar is nothing *but* "prosecutorial sleight of hand." It ignores the essential nature of the petitioners' conduct, and uses the "defraud clause" as a "cloak," in an effort to revive a prosecution that would otherwise not merely be time barred, but which would be insupportable as a matter of substantive law.

The Sixth Circuit elected to turn a blind eye to this prosecutorial overreaching.[5] Its decision invites similar

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[5] The court below would have done well to heed the admonition of the Second Circuit in *United States v. Rosenblatt*, 554 F.2d 36, 40 (2nd Cir. 1977):

> When the government proceeds under the conspiracy-to-defraud clause, in cases that could as easily have been brought under the "offense" clause, the courts must be alert to subtle "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404, 77 S.Ct. 963, 974, 1 L.Ed.2d

overreaching in any other case in which Congress elects to set an enhanced threshold of criminality, or the courts interpret a criminal statute as having done so. This kind of prosecutorial "end run" is simply impermissible, and inconsistent with the limits on prosecutorial overreaching exemplified by such decisions as *Bridges v. United States, supra.* The Court should grant *certiorari* and, on plenary hearing, reinforce the limitations on prosecutorial overreaching ignored by the Sixth Circuit decision in the case at bar.

III. THE DECISION BELOW IGNORES FUNDAMENTAL PRINCIPLES OF CRIMINAL LIABILITY, AND ALLOWS THE CRIMINALIZING OF CONDUCT WHICH IS NOT UNLAWFUL; THE COURT SHOULD GRANT *CERTIORARI* TO CORRECT THE ERROR, AND TO PROVIDE GUIDANCE AS TO THE APPLICATION OF THE "DEFRAUD CLAUSE" OF THE GENERAL CONSPIRACY STATUTE, AND THE BASIC PRINCIPLES OF CRIMINAL LIABILITY INVOLVED IN SUCH APPLICATIONS.

The Sixth Circuit framed the issue presented by this case as whether "a § 371 conspiracy to defraud requires proof of the same intent as the substantive charge connected to the conduct," and answered the question in the

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931 (1957). The terms "conspiracy" and "defraud," when used together, have a "peculiar susceptibility to a kind of tactical manipulation which shields from view very real infringements on basic values of our criminal law." Goldstein, 409 [*Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959)] . . . .

negative, reasoning that "because there is no 'substantive' offense underlying a § 371 conspiracy to defraud . . . it is unnecessary to refer to any substantive offense when charging a § 371 conspiracy to defraud, and it is also unnecessary to prove the elements of a related substantive offense." *Khalife*, 106 F.3d at 1302-1303.

Criminal liability under federal law is not, however, free-floating, because "there are no common-law offenses against the United States, . . . before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute . . . ." *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (citations omitted) (quoting *United States v. Lacher*, 134 U.S. 624, 628 (1890)).

While the boundaries of conduct proscribed by the "defraud clause" of the general conspiracy statute are broad indeed, they cannot be wholly limitless. It is for this reason that the Court observed in *Dennis v. United States*, 384 U.S. 855, 860 (1963), perhaps the leading "defraud clause" case, that "indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable."

In the wholly *malum prohibitum*, highly technical, area of currency transaction reports, the wrongfulness or blameworthiness of particular conduct is defined by the specific provisions of Title 31, as interpreted by the courts. Citizens, and the courts, must look to the statutory standards, correctly interpreted, for definition of

what is wrongful and what is not. If one looks to the statutory standards relating to what is referred to as "structuring," one learns that those statutes, as definitively interpreted by this Court, do not define "structuring" as wrongful unless the actor has actual knowledge of the statutory prohibition against "structuring."

Obviously, a conspiracy to defraud need not necessarily contemplate a course of action or a result that violates a federal criminal statute – otherwise, the "offense" and "defraud" clauses of § 371 would be redundant. However, to constitute a "fraud" for purposes of "defraud clause" prosecution, the charged agreement must surely be attended by a purpose which is wrongful by some understandable or accepted measure.[6]

Thus, "frauds" are recognized (and recognizable) because they partake of the kind of dishonesty, "moral turpitude or intentional wrong . . . bad faith or immorality," *Neal v. Clark*, 95 U.S. 704, 709 (1877), that are commonly understood as being subject to both moral and legal condemnation.

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[6] This observation echoes what has been known as the "Powell doctrine," originating in *People v. Powell*, 63 N.Y. 88 (1875). As this Court described the principle in *United States v. Feola*, 420 U.S. 671, 691 (1975), "a conspiracy, to be criminal, must be animated by a corrupt motive or a motive to do wrong. Under this principle, such a motive could be easily demonstrated if the underlying offense involved an act clearly wrongful in itself; but it had to be independently demonstrated if the acts agreed to were wrongful solely because of statutory proscription. See Note, Developments in the Law – Criminal Conspiracy, 72 Harv.L.Rev. 920, 936 – 937 (1959)."

Even the broad reach of the "defraud clause" outlined by this Court in cases like *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924), is defined by commonly accepted measures of wrongfulness:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.

The average citizen need not guess at his peril whether his actions constitute a "fraud" in this sense, nor need he look to the statute books to determine whether his purpose is wrongful – whether or not he is aware of its lawfulness.

On the other hand, recourse to nonstatutory standards of behavior would not suggest that a group decision to so arrange a business's affairs so as to avoid the impact of a federal regulatory requirement is wrongful in any way whatsoever, morally or legally, even though its effect (or intent) is to keep information from the government. Secrecy is not a crime. There is no free-floating obligation to disclose one's activities to any agency of the government, including the IRS.

Indeed, absent the provisions of the "structuring" law, the logical inference would be that if one wanted, for whatever reason, to avoid the impact of federal regulation, he would only have to arrange his own conduct so

as not to come within the reach of the regulatory scheme.[7] Certainly the fact that the government has decreed that certain acts will have certain regulatory consequences does not imply, without more, that the citizen has some moral or legal obligation to perform those acts.[8]

Thus, the agreement which Count II of the instant Indictment charged petitioners with being party to was one which contemplated a result that was not wrongful, as defined by the only available standards. How, then, can an agreement to do something which is not wrongful itself be a crime? The simple answer, petitioners would suggest, is that it cannot. In the case at bar, however, the Sixth Circuit has in effect held otherwise. It is difficult to imagine a more fundamental injustice, or a more basic flaw, than this, and for no other reason than this, the grant of *certiorari* is appropriate.

More significantly, the impact, and the implications, of this decision go far beyond the admittedly limited group of pre-*Ratzlaf* "structuring" cases that may still be eligible for prosecution. Rather, the decision of the Sixth Circuit invites the criminalizing of a whole range of conduct which has not been legislatively defined, and is

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[7] The actor's intent in avoiding the ambit of the regulatory scheme would also seem to be, at least as a matter of common sense, irrelevant.

[8] To the contrary, when a law or regulation defines a right or duty, by implication it defines the negative of that right or duty as well. Under this analysis, if one is outside the scope or reach of the legal command or prohibition, it should make no difference if the exemption is by accident or design – so long as if, in gaining exclusion, the actor does not engage in conduct that is otherwise wrongful.

neither unlawful nor otherwise wrongful, and suggests an unprincipled and unlimited expansion of the reach of the federal criminal law.

This Court should grant *certiorari* in order to correct the course set by the egregiously wrong decision below.

CONCLUSION

The decision of the Sixth Circuit in the case at bar is fundamentally flawed, and in conflict with decisions of this Court, and with better-reasoned decisions of other circuits. Moreover, it invites prosecutorial overreaching, and permits the criminalizing of conduct which is in fact lawful. The consequences of this decision are potentially far-reaching.

The Court should grant *certiorari* to resolve the conflict between the circuits, to correct the error in the case at bar, and to give meaningful guidance as to the application of the "defraud clause" of the general conspiracy statute, a provision which is, as the case at bar shows, capable of substantial abuse, and the basic principles of criminal liability involved in such applications.

Respectfully submitted,

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Dated: July 21, 1997

APPENDIX A

No. 95-1901

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*	)	
v.	)	ON APPEAL from the United States District Court for the Eastern District of Michigan
WALID KHALIFE; FADI KHALIFE; FRED ABDENOUR; GOLDCORP, INC., *Defendants-Appellees.*	)	

Decided and Filed February 14, 1997

Before: SILER and BATCHELDER, Circuit Judges; CARR, District Judge.*

SILER, Circuit Judge. The United States ("the government") appeals the district court's pre-trial dismissal of Count 2 of the second superseding indictment which charged Walid Khalife, Fadi Khalife, Fred Abdenour, and Goldcorp, Inc. (collectively, "the defendants") with conspiring to defraud the United States in violation of 18 U.S.C. § 371. The district court held that the defendants could not be charged with a conspiracy to defraud the

*The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

United States when the conduct charged is prohibited by a specific statute involving structuring, 31 U.S.C. §§ 5322 and 5324. We reverse.

I. FACTS

The defendants were involved in a jewelry business that dealt largely in cash. On January 12, 1995, the defendants, along with Rashid Elia, Jamal Khalife, and Khalife Bros., were charged in a twenty-eight count superseding indictment. The various counts in the indictment included conspiracy under § 371, causing the concealment and covering up of material facts, money laundering involving the alleged proceeds of drug trafficking, mail fraud, making and subscribing a false tax return, and firearms violations. On January 12, 1995, the district court dismissed Counts 26 and 28. In February, the defendants and Elia filed a joint motion to dismiss Counts 1 through 16 and Count 27 pursuant to Federal Rule of Criminal Procedure 12(b). Count 1 charged the defendants with conspiracy to cause the concealment of material facts in violation of 18 U.S.C. §§ 371, 2(b), and 1001. Count 2 charged the defendants with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. Counts 3 through 16 charged the substantive offenses of concealment of material facts in violation of 18 U.S.C. §§ 2(b) and 1001. Count 27 charged Walid Khalife with making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1). A second superseding indictment was subsequently issued.

Based on plea agreements subsequently entered into by the government and the defendants, dismissal of

Count 2 was the sole issue before the district court. Walid Khalife and Fred Abdenour agreed to plead guilty to Count 2 but reserved their motion to dismiss that count.[1] Prior to taking the guilty pleas, the district court analyzed both Counts 1 and 2 before dismissing Count 2. Count 1 charged the defendants under the "offense" clause of § 371, while Count 2 charged an offense under the "defraud" clause of § 371. Count 1 alleged that from February 1, 1988 through December 28, 1990, the defendants conspired to cause to be concealed and covered up by scheme, trick, and device material facts in a matter within the jurisdiction of the IRS in violation of 18 U.S.C. §§ 371, 2(b), and 1001.[2] The material facts in question

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[1] Under the plea agreements, if this court reinstates Count 2, then defendants Walid Khalife and Fred Abdenour will plead guilty to that count in exchange for the dismissal of all other counts. If, however, Count 2 is not reinstated, the government will dismiss all charges against those two defendants. Because defendant Elia has pled guilty to a different count and has been sentenced, the government's appeal as to him has been voluntarily dismissed. The government states in its brief that Fadi Khalife has also pled guilty and awaits sentencing. Goldcorp and the government have reached a settlement agreement contingent upon the guilty pleas of the other defendants.

[2] Section 2(b) provides: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." Section 1001 provides in pertinent part: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . conceals or covers up by any trick, scheme, or device a material fact . . . shall be fined under this title or imprisoned not more than five years, or both."

were required to be reported under the structuring statute, 21 U.S.C. § 5313(a). When a domestic financial institution is involved in a currency transaction over $10,000, § 5313(a) compels the institution to file a currency transaction report ("CTR") with the Secretary of the Treasury.

Count 2 alleged that from January 4, 1988 to November 5, 1991, the defendants conspired to defraud the United States and the IRS, pursuant to § 371, by obstructing the governmental function of collecting data and CTRs. Count 2 referenced the overt acts outlined in Count 1 in addition to the defendants' currency deposits in less than $10,000 amounts at three different Michigan banks on the same dates. The alleged overt acts of the conspiracy consisted of hundreds of cash deposits into various Goldcorp bank accounts. During the course of the conspiracy, the defendants deposited $12,044,249 in cash.

The government did not charge the defendants with violations of the anti-structuring laws, 31 U.S.C. §§ 5322 and 5324(3), because it conceded that it could not prove the defendants knew that it was illegal to structure transactions to evade the banks' reporting requirements.[3] However, the government argued that a § 371 conspiracy to defraud the United States did not require proof that

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[3] The government could not prove the intent described in *Ratzlaf v. United States*, 114 S.Ct. 655 (1994), which requires proof that the defendant knew his structuring activities were illegal. Since *Ratzlaf*, however, Congress amended the structuring statute, 31 U.S.C. § 5322, to obviate the need to prove that a defendant knew his structuring activities were illegal. *See also* 31 U.S.C. § 5324. The conduct charged in the indictment occurred prior to the time the statute was amended.

the defendants knew their conduct was illegal. The district court agreed with the government and found that such knowledge was not an element of a § 371 conspiracy to defraud. Nevertheless, relying upon *United States v. Minarik*, 875 F.2d 1186 (6th Cir.1989), the district court dismissed Count 2. It determined that Count 2 was simply a conspiracy to violate a specific statute, either the structuring statute or the false statements statute. Those specific statutes required proof of *Ratzlaf* intent, i.e., the defendants knew they were violating the law. The district court interpreted *Minarik* to preclude the government's use of the "defraud" clause of § 371 where the defendants' conduct violated a specific statute. It concluded that the government should have charged Count 2 under the "offense" clause of § 371, and because the government admittedly could not prove *Ratzlaf* intent, Count 2 could not stand.

II. LAW

In dismissing Count 2, the district court interpreted 18 U.S.C. § 371. The interpretation of a statute is a question of law which this court reviews *de novo*. *United States v. Honaker*, 5 F.3d 160, 161 (6th Cir.1993) (reviewing *de novo* the dismissal of a charge under § 922(j)), *cert. denied*, 114 S.Ct. 1226 (1994). To determine the meaning of a statute, this court looks to the text and legislative history of the law. *Id.* ("If, after reference to the language, structure and legislative history of a statute, the intended scope of the statute remains ambiguous, the rule of lenity will apply.") (citations omitted).

A. Mens rea under a § 371 conspiracy to defraud

The district court first analyzed the intent element of a conspiracy to defraud under § 371 which provides:

> § 371. Conspiracy to commit offense or to defraud United States
>
> If two or more persons conspire either to commit any offense against the United States ["offense" clause], or to defraud the United States, or any agency thereof in any manner or for any purpose ["defraud" clause], and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

The defendants argue, as they did before the district court, that the *Ratzlaf* intent requirement applies to a § 371 conspiracy to defraud based upon structuring activities. They cite *United States v. Curran*, 20 F.3d 560, 571 (3d Cir.1994), and *United States v. Alston*, 77 F.3d 713, 718 (3d Cir.1996), for the specific proposition that a § 371 conspiracy to defraud requires proof of the same intent as the substantive charge connected to the conduct. In response, the government cites *United States v. Jackson*, 33 F.3d 866, 871-72 (7th Cir.1994), *cert. denied*, 115 S.Ct. 1316 (1995), which held that a § 371 conspiracy to defraud did not require proof that the defendant violated the anti-structuring laws: "[T]he 'overall scheme to circumvent the currency reporting laws and to prevent the IRS from collecting accurate data, reports and income taxes supports a conspiracy conviction regardless of the absence of substantive currency law violations.' " *Id.* at 871 (quoting *United States v. Bucey*, 876 F.2d 1297, 1313 (7th Cir.1989)).

In *Jackson*, the defendants conspired to defraud the United States by impeding the lawful functions of the IRS. *Id.* at 867. The *Jackson* court acknowledged that the *Ratzlaf* decision involved the interpretation of the term, "willfully," found in 31 U.S.C. § 5322(a). Because § 371 contained no language connoting "willfully," the *Jackson* court held that *Ratzlaf* intent was not an element of a § 371 conspiracy to defraud. *Id.* at 871. The *Jackson* court then set forth the elements of a § 371 conspiracy to defraud including the proper mens rea:

> (1) an agreement to accomplish an illegal objective against the United States;
>
> (2) one or more overt acts in furtherance of the illegal purpose; and
>
> (3) the intent to commit the substantive offense, i.e., to defraud the United States.

Id. at 872. Ultimately, the *Jackson* court held:

> A conviction under § 371, therefore, does not require that the government prove a violation of a separate substantive statute. *Id.* at 1312; *accord United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir.1993) (stating that under § 371 "[n]either the conspiracy's goal nor the means used to achieve it need to be independently illegal"); *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir.1988) (stating that "section 371's ban on conspiracies to defraud need not involve the violation of a separate statute"), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989).

Id. at 870. The *Jackson* court's holding is logical because there is no "substantive" offense underlying a § 371 conspiracy to defraud. Thus, it is unnecessary to refer to any

substantive offense when charging a § 371 conspiracy to defraud, and it is also unnecessary to prove the elements of a related substantive offense. Agreeing with the government and noting the *Jackson* decision, the district court stated:

> While this Court agrees with the *Curran* holding that the *Ratzlaf* intent requirement, i.e. knowledge that the conduct was unlawful, must be proven for a conviction under 18 U.S.C. §§ 2(b) and 1001, the Court does not agree that such intent must be proven to establish guilt under the "defraud" clause of 18 U.S.C. § 371. . . . Therefore, *if* it is legally permissible to charge defendants under the "defraud" clause of 18 U.S.C. § 371, the government need not prove that defendants knew that their conduct was illegal.

The government presents the better argument, which is also in harmony with this court's holding in *United States v. Collins*, 78 F.3d 1021 (6th Cir.1996). In *Collins*, this court held as follows in the context of a § 371 conspiracy to defraud the IRS: "The intent element of § 371 **does not require the government to prove that the conspirators were aware of the criminality of their objective,** but it does require the government to show that they knew of the liability for federal taxes." *Id.* at 1038 (emphasis added) (citation omitted); *accord United States v. Brown*, 31 F.3d 484, 489 n. 5 (7th Cir.1994). *Contra Alston*, 77 F.3d at 718 (requiring "that a conviction to defraud the United States by pre-1994 structuring must also be supported by proof that the defendant knew that structuring was illegal"). Thus, under *Collins*, the district court and the

government are correct in concluding that *Ratzlaf* intent does not apply to a § 371 conspiracy to defraud.

B. The propriety of charging Count 2 under the "defraud" clause of § 371

The defendants cite *United States v. Minarik*, 875 F.2d 1186 (6th Cir.1989), for the proposition that they can only be charged under the "offense" clause of § 371 because their conduct is covered by a specific offense defined by Congress, namely the structuring laws. *Id.* at 1194 ("Only by treating conspiracies to commit specific offenses (which are also arguably general frauds) exclusively under the offense clause of § 371 can multiple convictions and unnecessary confusion be avoided."). The *Minarik* court, however, addressed a scenario with three distinguishing characteristics. First, there was a great deal of confusion resulting from the government's shifting theories of prosecution and failure to clearly define the intent element in the indictment. *Id.* at 1194-95. The one-count indictment in *Minarik* vaguely charged the defendants with conspiring "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury." *Id.* at 1188. The confusion in *Minarik* is absent in the present case.

Second, the *Minarik* defendants' conduct consisted of one limited act of concealing the proceeds of a real estate transaction to prevent a levy upon the proceeds by the IRS. *Id.* at 1194-95. The breadth of the activity was not commensurate with the *Minarik* court's conception of a general conspiracy to defraud. In this case, the activity of the defendants is much broader in terms of temporal

duration, number of events, and variety of crimes implicated.[4]

Third, the *Minarik* defendants' duties were sufficiently technical to warrant more specific notice:

> But where the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause.

Id. at 1196. Because the duties in this case are not as technical as those in *Minarik* and because the present defendants received specific notice of the crimes charged, *Minarik* is inapposite.

Dicta in *Minarik* implies that the two clauses within § 371 are nevertheless mutually exclusive: "the Government's handling of this case, graphically illustrates the confusion generated if the offense clause and the defraud clause are treated as overlapping rather than mutually exclusive." *Id.* at 1194. Since *Minarik*, however, this court

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[4] According to the indictment, the defendants' activity was far broader than an isolated incident of structuring. In fact, the conspiracy allegedly lasted several years, included seven defendants, involved myriad acts and transactions, resulted in the deposit of millions of dollars in different banks, and implicated several crimes including mail fraud, money laundering, making and subscribing a false tax return, conspiracy to use a false writing, concealing and covering up material facts, and firearms violations.

has limited the expansive language intimating that the offense and defraud clauses are mutually exclusive: "*Minarik* did not require that all prosecutors charge all conspiracies to violate a specific statute under the offense clause of section 371." *United States v. Mohney*, 949 F.2d 899, 902 (6th Cir.1991). The *Mohney* court cited language in *Minarik* which indicated that *Minarik*'s holding was strictly limited to its facts. *Id.* (citing *Minarik*, 875 F.2d at 1187, 1194); *accord United States v. Goulding*, 26 F.3d 656, 663 (7th Cir.), *cert. denied*, 115 S.Ct. 673 (1994); *United States v. Hurley*, 957 F.2d 1, 3 (1st Cir.), *cert. denied*, 506 U.S. 817 (1992); *United States v. Harmas*, 974 F.2d 1262, 1267 (11th Cir.1992). The *Mohney* panel then distinguished *Minarik* in several respects. Unlike the confusion extant in the indictment and prosecution theories in *Minarik*, the *Mohney* court noted that the defendants were clearly apprised of the charges against them. *Mohney*, 949 F.2d at 904; *see also Hurley*, 957 F.2d at 3 (noting that primary problem in *Minarik* was caused by confusion from shifting theories of prosecution); *accord Goulding*, 26 F.3d at 663; *United States v. Arch Trading Co.*, 987 F.2d 1087, 1092 (4th Cir.1993); *United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir.), *cert. denied*, 502 U.S. 813 (1991). The indictment in *Mohney* not only charged the defendants with conspiring "to defraud the United States of America by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service," but also "tracked the language of section 371, named the agency impeded and explained how, and by whom, the agency was impeded, and clearly charged a violation of the defraud clause of section 371." *Mohney*, 949 F.2d at 904.

The *Mohney* court next distinguished the breadth of the conduct in *Minarik:*

> "Although the charges in *Minarik* had been brought under the broad scope of the defraud clause, they amounted to a violation of one specific statute, 26 U.S.C. § 7206(4)." *Id.* The court concluded: "Because the conspiracy implicated a variety of statutes, our case is distinguishable from *Minarik* where the court was concerned with honoring Congress' intent in enacting specific statutes. . . . " *Id.* at 905; *accord Alexander v. Thornburgh,* 943 F.2d 825, 830-31 (8th Cir.1991) (distinguishing *Minarik* because defendant's conduct was "long-spanning, far-reaching, and involve[d] many activities and events"), *vacated on other grounds,* 509 U.S. 544 (1993). Finally, the *Mohney* court held that the defendants' duties to file tax returns and not to file false returns were not "technical and difficult to discern" like those duties described in *Minarik.* Based on these three distinctions, the *Mohney* decision reversed the district court's dismissal of the conspiracy to defraud count. *Mohney,* 949 F.2d at 904-05.

Similarly, *United States v. Sturman,* 951 F.2d 1466 (6th Cir.1991), *cert. denied,* 504 U.S. 985 (1992), noted that "[t]he broad nature of the conspiracy, and the associated violation of several statutes, distinguishes this case from *Minarik." Id.* at 1474. The *Sturman* court stated that, unlike *Minarik,* the defendants were adequately informed of the charges against them. *Id.* The indictment in *Sturman* charged the defendants with conspiracy:

> to defraud the United States of America by hampering, hindering, impeding, impairing,

> obstructing and defeating the lawful Governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes [in violation of 18 U.S.C. § 371.]

Id. at 1472. Addressing the nature of the charge and the evidence presented, the *Sturman* court concluded:

> The conspiracy alleged and proven here was broader than a violation of a specific statute.
>
> * * *
>
> This Court, in *Minarik*, noted that the holding in the case referred to the offense and defraud clauses "as applied to the facts in this case." 875 F.2d at 1187. The facts in *Minarik* and this case are distinguishable. Reuben Sturman set up a complex system of foreign and domestic organizations, transactions among the corporations, and foreign bank accounts to prevent the IRS from performing its auditing and assessment functions. Evidence shows that he committed a wide variety of income tax violations and engaged in numerous acts to conceal income. This large conspiracy involved many events which were intended to make the IRS impotent.

Id. at 1473; *see also Hurley*, 957 F.2d at 1; *United States v. Notch*, 939 F.2d 895, 901 (10th Cir.1991) ("The object of the conspiracy went beyond filing false tax returns; it was to conceal taxable income in order to prevent the IRS from accurately ascertaining and collecting income taxes."). Distinguishing *Minarik*, the *Sturman* court held that the defendants were properly charged under the defraud clause of § 371. *Sturman*, 951 F.2d at 1474.

The notice to the defendants also distinguishes this case from *Minarik*.

Considering the lucidity of the indictment, the defendants cannot maintain that they did not receive notice of the nature of the charges. There was no confusion nor prosecutorial vacillation in this case. As the district court noted, there was no change in the government's theory of prosecution. Thus, the defendants were certainly apprised of the nature of the charges against them. *See Mohney*, 949 F.2d at 904.

Finally, the defendants' duty not to conceal transactions over $10,000 from the IRS does not seem to be as "technical and difficult to discern" as the precise timing of the defendant's duty in *Minarik*, 875 F.2d at 1195 (noting that, under Internal Revenue Code provision, duty of non-concealment arises only at time of notice of assessment for back tax). Because the *Minarik* requirement of mutual exclusivity is dicta, and because we have subsequently confined *Minarik* to its facts, we conclude that the law in this circuit does not require, in circumstances such as these, that the conspiracy be charged only under the "offense" clause of § 371. Therefore, we AFFIRM the district court's determination that *Ratzlaf* intent does not apply to a § 371 conspiracy to defraud, but we REVERSE the dismissal of Count 2 and REMAND this case to the district court for further proceedings consistent with this decision.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs.

D-1 WALID KHALIFE,
D-2 FADI KHALIFE,
D-3 JAMAL KHALIFE,
D-4 FRED ABDENOUR,
D-5 RASHID ELIA,
D-6 GOLD CORP, INC.,
D-7 KHALIFE BROS.,

Defendants.
_____/

CRIMINAL CASE NO.: 93-81226

HON. PATRICK J. DUGGAN

OPINION

I. Background

On January 12, 1995, the above-named defendants were charged in a twenty-eight count superseding indictment.[1] On March 13, a second superseding indictment was issued.

On February 24, 1995, Walid Khalife, Fadi Khalife, Fred Abdenour, Rashid Elia and gold Corp., Inc. ("defendants") filed a joint motion to dismiss Counts 1 through 16[2]

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[1] On that date, this Court issued an order dismissing Counts 26 and 28 of the superseding indictment.

[2] Count 1 charges defendants with conspiracy to cause the concealment of material facts in violation of 18 U.S.C. §§ 371,

and Count 27[3] of the superseding indictment pursuant to Fed.R.Crim.P. 12(b). On March 1, Walid Khalife filed two motions to dismiss Counts 1 through 4 and 6 through 16, based on (1) lack of proof of requisite knowledge and (2) lack of materiality.[4] Based on plea agreements subsequently entered into by the government and defendants, dismissal of Count 2 is the sole issue before this Court. On April 27, this Court held oral argument on defendants' motions, during which the parties limited their arguments to Count 2 only.

Count 1 alleges that from February 1, 1988 through December 28, 1990, defendants conspired to cause to be concealed and covered up by scheme, trick and device material facts in a matter within the jurisdiction of the IRS, which facts were required to be reported under 31 U.S.C. [S]5313(a),[5] in violation of 18 U.S.C. §§ 371, 2(b)[6]

2(b) and 1001. Count 2 charges defendants with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. Counts 3 through 16 charge defendants with causing the concealment of material facts in violation of 18 U.S.C. §§ 2(b) and 1001.

[3] Count 27 charges Walid Khalife with making and subscribing a false return in violation of 26 U.S.C. § 7206(1).

[4] Walid Khalife acknowledges that his separate motions overlap to some degree with defendants' joint motion to dismiss. *See* Walid Khalife's Mot. to Dismiss for Lack of Proof of Requisite Knowledge ¶ 7; Mot. to Dismiss for Lack of Materiality ¶ 8.

[5] Under 31 U.S.C. § 5313(a), when a domestic financial institution is involved in a currency transaction over $10,000, the institution shall file a currency transaction report ("CTR") with the Secretary of Treasury. *See* 31 C.F.R. § 103.22(a).

[6] 18 U.S.C. § 2(b) provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another

and 1001.[7] Count 2 alleges that from January 4, 1988 through November 5, 1991, defendants conspired to defraud the United States and the IRS by obstructing the governmental function of collecting data and CTRs in excess of $10,000 in violation of 18 U.S.C. § 371. In Count 2 the indictment references the overt acts outlined in support of count 1 in addition to defendants' currency deposits in less than $10,000 amounts at various financial institutions (Commerica Bank, First Federal Savings Bank and Trust, and First of America – Southeast Michigan) on the same day.[8] In Count 1, the government charged defendants under the "offense" clause of 18 U.S.C. § 371; in Count 2, defendants are charged under the "defraud" clause of § 371.

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would be an offense against the United States, is punishable as a principal."

[7] 18 U.S.C. § 1001 provides in pertinent part that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United Sates knowingly and willfully . . . conceals or covers up by any trick, scheme, or device a material fact . . . shall be fined under this title or imprisoned not more than five years, or both."

[8] Count 1 involved the same activities as to Comerica Bank only.

II. Discussion

1.

What "intent" requirement must the government prove beyond a reasonable doubt to obtain a conviction under the "defraud" clause of U.S.C. § 371?

A. Does the *Ratzlaf*[9] intent requirement apply to a "defraud" clause conspiracy charge under § 371?

18 U.S.C. § 371 provides:

> **§ 371. Conspiracy to commit offense or to defraud United States**
>
> If two or more persons conspire either to commit any offense against the United States ["offense" clause], or to defraud the United States, or any agency thereof in any manner or for any purpose ["defraud" clause], and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Defendants contend that the intent requirement for 31 U.S.C. §§ 5322 and 5324[10] mirrors that of 18 U.S.C. §§ 2(b) and 1001 based on the Supreme Court's decision in *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) and the Third Circuit's decision in *United States v . Curran*, 20 F.3d 560 (3d Cir. 1994). The

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[9] *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994).

[10] 31 U.S.C. § 5324 was enacted as part of the "Money Laundering Control Act of 1986" to deter circumvention of domestic financial institutions' reporting requirement to report currency transactions of more than $10,000.

government acknowledges that it cannot prove the intent requirement outlined in *Ratzlaf*. Defendants argue, therefore, that dismissal of Count 2 is required, because the *Curran* Court held that the *Ratzlaf* intent requirement applies to a 18 U.S.C. § 371 defraud clause conspiracy charge based on the same conduct as the substantive count.[11] In opposition, the government cites *United States v. Jackson*, 33 F.3d 866 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1316 (1995), which held that the *Ratzlaf* intent requirement is *not* required to obtain a § 371 defraud clause conviction based on structuring activities.

Ratzlaf

In *Ratzlaf*, the Supreme Court considered the following question pertaining to a defendant's conviction under 31 U.S.C. §§ 5322(a) and 5324(3): "[d]oes a defendant's purpose to circumvent a bank's reporting obligation suffice to sustain a conviction for 'willfully violating' the antistructuring provision?". 114 S.Ct. at 657. Justice Ginsburg, writing for a five-justice majority, held that:

> the "willfulness" requirement [of § 5322(a)] mandates something more. *To establish that a defendant "willfully violated" the antistructuring law, the government must prove that the defendant acted wtih knowledge that his conduct was unlawful.*

Id. (emphasis added).

At the time of *Ratzlaf* (Jan. 11, 1994), that statute provided:

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[11] Walid Khalife's motion for dismissal for lack of proof of requisite knowledge also relies on *Curran*.

> A person *willfully* violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

31 U.S.C. § 5322(a)(emphasis added).[12] *See Ratzlaf*, 114 S.Ct. at 658-59. At that time, a person violating section 5324 was subject to criminal penalties under section 5322. *Id.* at 657, 658-59.

In reaching its decision that the government must prove that the defendant acted with knowledge of the action's unlawful nature, the *Ratzlaf* majority found that "currency structuring is not inevitably nefarious" or bad. *Id.* at 660-61. The Court then found:

> [i]n § 5322, congress subjected to criminal penalties only those "willfully violating" § 5324, signaling its intent to require for conviction proof that the defendant knew not only of the bank's duty to report cash transactions in excess of $10,000, but also of his duty not to avoid triggering such a report. There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear.

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[12] Subsequent to the *Ratzlaf* decision, Congress amended 31 U.S.C. §§ 5322 and 5324 to obviate the *Ratzlaf* intent requirement to obtain a § 5324 conviction. *See* Pub. L. No. 103-325, 108 Stat. 2160, Title IV § 401 (Sept. 23, 1994). *See also United States v. Zehrbach*, 47 F.3d 1252, 1262 n.7 (3d Cir.) *cert. denied*, 115 S.Ct. 1699 (1995); *United States v. Vazquez*, 53 F.3d 1216 n.2 (11th Cir. 1995). As the parties conceded at oral argument, the amendment is inapplicable in this case, which arose before the amendment was enacted.

Id. at 662. *While recognizing "the venerable principle that ignorance of the law generally is no defense to a criminal charge,"* which the majority stated that it did not dishonor by its present decision, *the majority found that Congress may decree otherwise,which it believes was done in the enactment of 31 U.S.C. § 5322(a). Id.* at 663 (emphasis added). The Court ultimately held that to convict the defendant under 31 U.S.C. §§ 5322(a) and 5324(3) "the jury had to find he knew the structuring in which he was engaged was unlawful." *Id.*

Defendants contend that based on *Ratzlaf's* imposition of the "knowledge of unlawfulness" requirement under §§ 5322 and 5324, the government is required to prove the same requirement to establish a § 371 conviction based on structuring activities (which the government concedes it cannot do) under the Third Circuit's decision in *United States v. Curran.*

Curran

In *Curran,* the defendant was convicted on charges of causing election campaign treasurers to submit false reports to the Federal Election Commission ("the Commission") in violation of 18 U.S.C. §§ 2(b) and 1001, the false statements statute, and § 371 for the same conduct. 20 F.3d at 562.[13] The jury convicted the defendant of three counts of violating §§ 2(b) and 1001 by causing treasurers

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[13] In *Curran,* the defendant reimbursed employees for writing out personal checks payable to election campaigns of designated candidates for federal and state office. 20 F.3d at 562-63.

of campaign committees to conceal material facts from the Commission and by causing the treasurers to submit false contribution reports, and convicted him of one count of conspiring to impede the performance of the lawful functions of the Commission and to cause false contribution reports to be filed with the Commission in violation of the defraud clause of § 371. *Id.* at 563.

In discussing the jury charges on the substantive counts, §§ 2(b) and 1001, the Third Circuit found that:

> [s]ection 1001 proscribes two different types of conduct: concealment of material facts and false representations. . . . concealment must be established through evidence of willful non-disclosure by means of a "trick, scheme, or device."
>
> In order to convict under a section 1001 concealment charge, the government must show that a defendant had a legal duty to disclose the facts at the time he was alleged to have concealed them.

Id. at 566 (citations omitted). Since the government conceded that the duty to disclose the source of contributions to the commission was the campaign treasurers' and not the defendant's, the defendant could not be guilty of concealment *directly* under § 1001. *Id.* at 566-67.

The defendant did not prepare or file the false reports himself, and therefore, his conduct did not fall directly within § 1001's scope. "To bridge the gap, the government used section 2(b) in conjunction with section 1001 to charge defendant with *causing* the campaign treasurers to file false reports." *Id.* at 567 (emphasis added). The Court held:

> [w]hen proceeding under section 2(b) in tandem with section 1001, the government must prove that a defendant caused the intermediary to make false statements. . . . The prosecution must not only show that a defendant had the requisite intent under section 1001 (deliberate action with knowledge that the statements were not true), *but must also prove that he "willfully" caused the false representations to be made.*

Id. at 567-68 (emphasis added).

The Third Circuit discussed the *Ratzlaf* decision and found that nothing in that decision confined its "willfulness" rationale to the currency reporting statute. *Id.* at 568. Based on three similarities between the statutes at issue in its case and in *Ratzlaf*,[14] the *Curran* Court held that:

> a proper [jury] charge for willfulness in cases brought under section 2(b) and 1001 in the federal election law context requires the prosecution to prove that defendant knew of the treasurers' reporting obligations, that he attempted to frustrate those obligations, and *that he knew his conduct was unlawful.*

Id. at 569 (emphasis added).

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[14] First, "[t]he disclosure obligations imposed by the Election Campaign Act correspond with those dictated by the currency reporting statute . . . [which] involves the defendant's knowledge of a third party's duty to disclose information to a government agency." Second, the "underlying conduct is not obviously evil or inherently bad." Third, the "conduct at issue in both cases was made illegal by a regulatory statute." *Curran*, 20 F.3d at 569 (internal quotations omitted)

The Court reversed the conviction and ordered a new trial. In this regard, the Court stated:

> [h]aving determined that the case must be retried, we believe it appropriate to discuss other deficiencies in the jury instruction that should be corrected. The charge was inadequate in that it failed to state that the government had the burden of proving that [the] defendant knew of the campaign treasurers' obligation to submit contribution reports to the Federal Election Commission. . . . The jurors should have been told that to convict [the] defendant, the government had to prove that he knew that the treasurers had such a duty.

Id. at 570 (citing *Ratzlaf*, 114 S.Ct. at 662-63). In sum, the Court found that:

> the government had the burden of proving that [the] defendant was aware that the campaign treasurers were bound by the law to accurately report the actual source of the contributions to the commission, that the defendant's actions were taken with the specific intent to cause the treasurers to submit a report that did not accurately provide the relevant information, and *that the defendant knew that his actions were unlawful.*

Id. at 570-71 (emphasis added).

Turning to the defendant's conspiracy charge under § 371, the Court found that:

> [a]s stated earlier, the misstatement of the law applicable to the defendant's legal duty to disclose facts to the Commission amounted to plain error. *This misstatement undermined not only the substantive counts, but the conspiracy one as well.* The essence of conspiracy is an agreement to

> commit an act that is illegal. *If a jury is misled into considering as unlawful the omission of an act that the defendant is under no duty to perform, then a finding of conspiracy based on such conduct cannot stand. It follows that the conspiracy count must therefore be vacated.*

Id. at 571 (emphasis added). The Court then found that:

> [i]n charging the jury on the conspiracy count, the trial court essentially incorporated the instruction on intent it had used for the substantive counts. The comments we have previously made about the failings of the instruction on intent apply to the conspiracy count as well. . . . On retrial, the instructions on intent as to the conspiracy count must track those applicable to the substantive counts.

Id. (internal citation omitted).

Jackson

The government responds that *Curran* cannot be reconciled with *United States v. Jackson*, cited *supra*, wherein the Seventh Circuit vacated the defendants' convictions for violations of the antistructuring statutes, 31 U.S.C. §§ 5322(a) and 5324(3), *see* 33 F.3d at 869, but affirmed the defendants' § 371 "defraud" clause conspiracy convictions based on the same activity. *Id.* at 867, 871. At the trial in *Jackson*, the government offered proofs that the defendants illegally structured their financial transactions and that they conspired to defraud the United States by impeding the lawful functions of the IRS. *Id.* at 867. After setting forth the evidence offered in support of the defendants' conspiracy conviction under 18 U.S.C. § 371, *id.* at

868-69, the Court found that *Ratzlaf* requires reversal of the *substantive* convictions for violations of the antistructuring statutes. *Id.* at 869.

As to the conspiracy convictions, one of the defendants argued that because the defendants' § 371 convictions were dependent upon the antistructuring law violations, *Ratzlaf* requires the reversal of the conspiracy convictions. *Id.* The Court identified his argument as follows: "that the defendants' convictions for conspiring to defraud the United States were necessarily predicated on violations of the antistructuring laws." *Id.*

In response, the government argued (as it does in the present case) that a § 371 defraud clause conviction is an independent violation that need not be based on another substantive statute, *Id.* at 870. The government further argued that § 371 proscribes two types of conspiracies in the disjunctive, one of which obviates the need to demonstrate a violation of a substantive statute. *Id.* Recognizing that violation of another statute may provide overt act *evidence* required for a conspiracy conviction, the government stated that "the presence of such a violation is not the *sine qua non* of a § 371 conspiracy." *Id.* The government then argued that *Ratzlaf* does not require reversal of the defendants' conspiracy convictions, as the *Ratzlaf* court was concerned with the interpretation of the word "willfully" found in 31 U.S.C. § 5322(a). *Id.*

Holding that the government's position was correct, the Seventh Circuit found that a defendant can be charged with two types of conspiracies under 18 U.S.C. § 371, and that a § 371 conviction "does not *require* that

the government prove a violation of a separate substantive statute." *Id.* (emphasis in original). The Court then found that:

> [the defendant's] first contention – that *Ratzlaf* requires reversal of the § 371 convictions – is misplaced because the government did not have to demonstrate that the defendants violated the antistructuring laws. *Ratzlaf's* holding concerning the meaning of "willfully violating" in the antistructuring laws, therefore, has no bearing on the defendants' § 371 convictions; § 371 contains no such language.

Id. at 871.

While this Court agrees with the *Curran* holding that the *Ratzlaf* intent requirement, i.e. knowledge that the conduct was unlawful, must be proven for a conviction under 18 U.S.C. §§ 2(b) and 1001, the Court does not agree that such intent must be proven to establish guilt under the "defraud" clause of 18 U.S.C. § 371. The Court therefore concludes that the government is *not* required to prove that defendants knew of the illegality of their structuring activities to obtain a conviction under the *defraud* clause of § 371. This Court believes that it would be improper to extend *Ratzlaf's* reasoning to a charge of conspiracy to defraud the United States. Therefore, *if* it is legally permissible to charge defendants under the "defraud" clause of 18 U.S.C. § 371, the government need not prove that defendants knew that their conduct was illegal.

2.

May the government charge these defendants under the "defraud" clause of § 371, rather than the "offense" clause?

In support of their position that the government is required to charge them under the "defraud" clause of § 371, defendants rely on the Sixth Circuit's decision in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), contending that this decision mandates that the government charge defendants under the "offense" clause of § 371. Specifically, defendants contend that the government must charge and prove a conspiracy to cause the concealment of material facts, a specific offense covered by 18 U.S.C. §§ 2(b) and 1001. Defendants contend that the conduct which the government alleged that they engaged in implicates 18 U.S.C. §§ 2(b) and 1001, and thus the prosecution of these defendants must be limited to the "offense" clause of § 371.[15]

The government contends that the holding in *Minarik* does not require a dismissal of Count 2 because the holding in *Minarik* is limited to the specific facts of *Minarik* and that any language in *Minarik* that conflicts with *Tanner v. United States*, 483 U.S. 128, 129, 107 S.Ct. 2739,

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[15] If the government is required to proceed under the "offense" clause of § 371 as defendants contend, then defendants argue that the government must prove the *Ratzlaf* "knowledge" element, a requirement the government concedes it cannot meet.

2752, 97 L.Ed.2d 90 (1987), which observes the "broad language of § 371," is dicta.[16]

In *Minarik*, the defendants were charged under § 371 with willfully conspiring "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury." 875 F.2d at 1188. The indictment further stated that it was part of the conspiracy that the defendants would "conceal and continue to conceal the nature of [Campbell's] business affairs regarding . . . property owned by her . . . and would conceal and continue to conceal the source and nature of her income from said business affairs. . . . All in violation of Title 18, [U.S.C.], Section 371." *Id.*

In a bill of particulars, the government "elaborated its theory" alleging that the defendants attempted to avoid the currency reporting requirements of 31 U.S.C. § 5313(a). *Id.* at 1188-89. Subsequently, the government abandoned its claim of a violation of 31 U.S.C. § 5313(a).[17]

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[16] The government's argument is based on the following language from *Tanner*: "the broad language of § 371, covering conspiracies to defraud 'in any manner for any purpose,' puts no limits based on the *method* used to defraud the United States." 483 U.S. at 129, 107 S.Ct. at 2752 (emphasis in original). This language from *Tanner* and the proposition which it stands for (that a method that makes uses of innocent individuals or businesses to reach and defraud the United States is not beyond the scope of § 371) does not relate to defendants' argument that under *Minarik*, the government was obligated to charge them under the "offense" clause of § 371.

[17] As discussed later in this Opinion, the court concluded that the facts would support only a charge of a violation of 26 U.S.C. § 7206(4).

The "offense" and "defraud" clauses of 18 U.S.C. § 371 are disjunctive. Section 371 "creates *one* crime that may be committed in *one of two* alternate ways." *Minarik*, 875 F.2d at 1193 (emphasis in original). The *Minarik* Court concluded that a charge could only be brought under the "defraud" clause of § 371 if the underlying "criminal" conduct was not specifically prohibited, i.e. proscribed by a specific statute.

> Such a common-law interpretation of § 371 is consistent with what appears to be the primary purpose of the language in the 1867 statute criminalizing conspiracy to defraud the government. Its purpose was to reach conduct not covered elsewhere in the criminal code, a code which, unlike the present criminal code, had not elaborated specific fraud offenses. In light of later legislation creating numerous specific fraud statutes, the "defraud" portion of the statute should be viewed "as an interim measure protecting the government until such time as Congress has been able to deal more specifically with a given problem."

Id. at 1194.

The Court in *Minarik* concluded that despite the shifting theories and positions of the government as it proceeded to prosecute the defendants for conspiracy to "defraud," the only facts proven would support a conspiracy to violate 26 U.S.C. § 7206(4), which among other things prohibits individuals from concealing goods "whereof any tax is or shall be imposed, or any property upon which levy is authorized . . . with intent to evade or defeat . . . collection of any tax imposed. . . . " *Id.* at 1187.

In other words, since the conduct attributed to the defendants would constitute a violation of a specific statute, 26 U.S.C. § 7206(4), such conduct could only be charged as a violation of the "offense" clause of § 371; it could not be charged under the "defraud" clause of § 371. *Id.*

While subsequent cases have suggested that *Minarik* should be given a narrow interpretation ("the holding in the case referred to the offense and defraud clauses 'as applied to the facts in [*Minarik*]' "), *see United States v. Sturman*, 951 F.2d 1466, 1473 (6th Cir. 1991), nevertheless, the Court in *Sturman*, referring to the *Minarik* holding, stated:

> [t]he Court concluded that when Congress creates a specific offense out of conduct which was previously criminalized only if it took the shape of a conspiracy to defraud the United States, the court should require that a criminal conspiracy regarding that conduct be brought exclusively under the offense clause. Thus, if the offense clause covers an act or offense, a person cannot alternatively be convicted under the broad defraud clause. This rule comes into effect most often when a Congressional statute closely defines the duties a defendant is accused of violating. The Court reasoned that requiring an indictment to charge a defendant with conspiracy to commit a specific crime reduces the uncertainty in a case by defining up front the alleged crime.

Id. (internal citations omitted).

The Sixth Circuit in the subsequent cases of *Sturman* and *United States v. Mohney*, 949 F.2d 899 (6th Cir. 1991),

failed to apply the *Minarik* holding to the facts of those cases. The government contends that *Mohney* and *Sturman* support its position that *Minarik* must be strictly limited to the facts of *Minarik* and should not apply to the facts of the case at hand to warrant a dismissal.

However, in *Mohney* and *Sturman*, the Sixth Circuit distinguished the facts of those cases from the facts of *Minarik*. Whereas, in *Minarik*, the Court concluded that the facts which the government was using to prove a conspiracy to "defraud" were facts that would support a violation for the specific "offense" covered by § 7206(4) (and therefore could not be charged under the "defraud" clause of § 371), the facts necessary to prove the conspiracy to "defraud" in *Mohney* and *Sturman* involved more than conduct which would constitute the violation of a *specific* statute.

As stated by the Court in *Mohney*:

> Although the charges in *Minarik* had been brought under the broad scope of the defraud clause, they amounted to a violation of one specific statute, 26 U.S.C. § 7206(4). . . . Thus, *Minarik* held that in order to properly alert defendants to the charges against them, prosecutors must use the offense clause when the conduct charged constitutes a conspiracy to violate one specific statute.

949 F.2d at 904. In *Mohney*, the Court acknowledged that the conspiracy charged involved violations of a number of statutes, a fact with which the defendants agreed. *Id.* The Court in *Mohney* concluded by stating: "[b]ecause the conspiracy implicated a variety of statutes, our case is distinguishable from *Minarik*. . . . " *Id.* at 905.

Similarly, the court in *Sturman* stated:

> Defendants here argue that the conduct alleged in Count I amounted to a violation of either 26 U.S.C. §§ 7206(1) or 7206(4) and that the conspiracy should have been charged under the offense clause of § 371. We disagree. The conspiracy alleged and proven here was broader than a violation of a specific statute.

951 F.2d at 1473. The Court found further that "[t]he facts in *Minarik* and this case are distinguishable." *Id.*

> This was not a conspiracy to violate specific provisions of the Tax Code but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses. . . . The broad nature of the conspiracy, and the associated violation of several statutes, distinguishes this case from *Minarik*. In this case, the alleged conduct violates several statutes. A "conspiracy to defraud" charge most clearly covers the conduct when viewed in its entirety.

Id. at 1473-74.

While this Court acknowledges that it is only bound to follow the precedent of *Minarik* where the facts of the case before it fit within the "narrow" parameters of *Minarik*, this Court believes that this is such a case. This Court does not believe that it can disregard the binding effect of *Minarik*, unless this Court concludes that there are sufficient distinguishing facts to permit it to conclude that *Minarik* does not control. In this case, the Court cannot find such distinguishing facts.

The Court believes that the facts of this case are very similar to the facts of *Minarik* and clearly distinguishable from the facts of *Mohney* and *Sturman*. Count 2 (Conspiracy to Defraud the United States) charged that defendants did "knowingly, willfully and unlawfully . . . conspire . . . to defraud the United States and the Department of Treasury, Internal Revenue Service . . . by impairing, obstructing and defeating its lawful governmental function of collecting data and reports of currency transactions in excess of $10,000." The indictment sets forth in more detail, the specific conduct in the "Manner and Means" and "Overt Acts" sections of the indictment. There is no serious dispute that the conduct which the government would rely on to prove the conspiracy to defraud is the conduct described in Count 1 which asserts a violation of the "offense" clause of 18 U.S.C. § 371 via §§ 2(b) and 1001.

3.

Does the *Ratzlaf* intent requirement apply to an "offense" clause conspiracy charge brought under 18 U.S.C. § 371 based on underlying antistructuring activities charged as violative of 18 U.S.C. §§ 2(b) and 1001?

As part of the "Money Laundering Control Act of 1986," 31 U.S.C. § 5324 was enacted to criminalize structuring transactions to evade reporting requirements, activities at issue in this case. At the time of defendants' activities, to establish that they violated the antistructuring laws, the government was required to prove that "the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf*, 114 S.Ct. at 657. Conceding that it could not prove that requirement to obtain a conviction

under the antistructuring laws, the government indicted the present defendants with substantive violations of 18 U.S.C. §§ 2(b) and 1001 and conspiracy violations under the "defraud" clause of § 371 (Count 2) and the "offense" clause via §§ 2(b) and 1001 (Count 1) based on their structuring activities.

Had the government pursued a conviction under the "offense" clause of § 371 for violating §§ 2(b) and 1001, it would have been required to prove the elements of the underlying offense beyond a reasonable doubt. *See United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975), wherein the Supreme Court found that:

> in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute [under the "offense" clause of 18 U.S.C. § 371], the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.

Id. at 686, 95 S.Ct. at 1265. *See id.* at 695, 95 S.Ct. at 1269 ("the knowledge of the parties is relevant to the same issues and to the same extent as it may be for conviction of the substantive offense"). *See also United States v. Goodman*, 945 F.2d 125, 128 (6th Cir. 1991).

Under 18 U.S.C. §§ 2(b) and 1001, the government would have been required to prove that defendants knew that their activities were unlawful based on § 2(b)'s use of the word "willfully," the term upon which the *Ratzlaf* decision hinges as it relates to 31 U.S.C. § 5322(a). *See Curran*, 20 F.3d at 569, wherein the Third Circuit found that the government must prove that the defendant knew of the illegality of his activities to sustain a conviction under 18 U.S.C. §§ 2(b) and 1001, based on *Ratzlaf*. 20 F.3d

at 568-69. The *Curran* Court reached this decision by comparing the statute at issue in its case, 18 U.S.C. § 2(b), with the statute at issue in *Ratzlaf*, 31 U.S.C. § 5322(a); both statutes contained the term "willfully," and both statutes were necessary to obtain convictions under 18 U.S.C. § 1001 and 31 U.S.C. § 5324, respectively.

By charging defendants under the broad "defraud" clause of § 371, which the *Minarik* Court found was enacted "to reach conduct not covered elsewhere in the criminal code," 875 F.2d at 1194, the government, in effect, "insulated" itself from having to prove an element of a crime that by its own concession, it cannot prove. Although the government did not consistently change its prosecution theory, as was done in *Minarik*, a specific offense, namely 31 U.S.C. § 5324, was enacted to prohibit defendants' conduct. However, because the government could not prove a requisite element of that offense (under *Ratzlaf*), it charged defendants under 18 U.S.C. §§ 2(b) and 1001 for the same underlying conduct. And in fact, in Count 1, the government originally charged defendants under the "offense" clause of § 371 citing §§ 2(b) and 1001. Under *Curran*, though, the government is required to prove the intent element to sustain an "offense" clause conspiracy conviction.

Unlike the situation in *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), wherein the government "secured no advantage . . . by charging [the defendants] under one clause of § 371 rather than the other," 384 U.S. at 863-64 n.8, 86 S.Ct. at 1845-46 n.8, the government in this case did secure an advantage by charging defendants under the "defraud" clause, because under *Ratzlaf* and *Curran*, the government would, in this

Court's opinion, be required to prove an element under the "offense" clause of § 371 that it admittedly cannot.

The Sixth Circuit's decision in *United States v. Schaffner*, 715 F.2d 1099 (6th Cir. 1983), *appeal after remand*, 771 F.2d 149 (6th Cir. 1985), upon which the government relies in the present case, does not compel a different result despite the *Mohney* Court's suggestion to the contrary. *See Mohney*, 949 F.2d at 903. The *Schaffner* Court recognized prosecutorial discretion at the indictment stage where the defendant's conduct is criminalized by *two different statutes*. The *Minarik* decision limited that discretion when both clauses of *one statute*, 18 U.S.C. § 371, are arguably violated by a defendant's conduct. In that limited circumstances, the government is required to prosecute the defendant under the "offense" clause, *if* a specific statute is violated by the defendant's conduct. Where numerous statutes are violated, as were in *Mohney* and *Sturman*, the government may properly charge the defendant under the "defraud" clause. In this case, however, where the government initially charged defendant under the "offense" clause of § 371 in Count 1 via violations of 18 U.S.C. §§ 2(b) and 1001 only, defendants are entitled to dismissal of Count 2.

4.

Is 18 U.S.C. § 371 subject to the "legal impossibility" defense, and if so, are defendants entitled to that defense?

Finally, defendants contend that dismissal of Count 2 is also required under the doctrine of legal impossibility,

because they did not *cause* Comerica Bank,[18] the financial institution where the currency deposits at issue were made, to fail to file CTRs, because Comerica had imputed and actual knowledge of defendants' deposit activity or acted with willful blindness and chose not to file CTRs with the IRS.[19] Defendants assert that since May 8, 1987, financial institutions, including Comerica, are required to aggregate currency transactions, and as a result Comerica had implied knowledge of defendants' deposits triggering the filing of CTRs and failed to file the CTRs despite said knowledge. Through "information and belief," defendants contend that Comerica had a computer or manual system throughout its branches which permitted it to aggregate currency deposits made at different branches. (Defs.' Mem. at 20).[20]

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[18] Although defendants limit their legal impossibility argument to Comerica Bank Count 2 involves Comerica, First Federal Savings Bank and Trust and First of America – Southeast Michigan.

[19] This argument is essentially the same as defendant Walid Khalife's in his motion to dismiss Counts 1 through 4 and 6 through 16 based on lack of materiality. Walid Khalife contends that based on the bank's duty to aggregate multiple currency transactions, defendant's alleged conduct *could not have caused* the bank to fail to file a CTR, and therefore, the facts concealed by defendant were not "material" as required to sustain a conviction under 18 U.S.C. § 1001. However, Count 2 does not reference 18 U.S.C. § 1001.

[20] Language from a government exhibit filed with this Court the day before oral argument on the present motions suggests that Comerica may have had an aggregation system in place at the time of defendants' structuring activities. *See* Gov't's Ex. 2 at 3 ¶ II. (dated May 23, 1988). The existence of

In *United States v. Peete*, 919 F.2d 1168 (6th Cir. 1990), the Court noted that "[l]egal impossibility is commonly defined as the case in which the defendant did everything he intended to do but yet had not committed the completed crime. . . . " *Id.* at 1176. *See United States v. Hamrick*, 43 F.3d 877 (4th Cir. 1995), *petition for cert. filed*, (U.S. Apr. 6, 1995) (No. 94-8773), wherein the Fourth Circuit found that "[t]he defense of legal impossibility is available where the defendant's acts, even if fully carried out as intended, would not constitute a crime." *Id.* at 885.

In *United States v. Everett*, 692 F.2d 596 (9th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), the Court considered the defendants' challenge to their convictions for conspiring to impair, impede, and obstruct the Department of the Treasury in violation of 18 U.S.C. § 371. The defendants argued that their convictions should be reversed based on the "legal impossibility" defense. *Id.* at 599. After noting that "the doctrine of legal impossibility is not available as a defense to a charge of conspiracy," *id.*, the Court found:

> [a] conspiracy to defraud the United States under 18 U.S.C. § 371 need not involve an agreement to defraud the government out of money or property, but only requires an agreement to impede the government's lawful functions. Section 371 does not require that the government actually be harmed; it reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government."

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such a system is irrelevant to defendants' entitlement to the legal impossibility defense.

Id. See United States v. Bosch, 914 F.2d 1239 (9th Cir. 1990), wherein the Court found that "[w]e have 'rejected the doctrine of legal impossibility as a defense to a charge of conspiracy.' " *Id.* at 1241.[21] *See also* Sixth Cir. Pattern Jury Instructions § 3.13.[22]

Based on the above, this Court finds that the "legal impossibility" defense does not apply to Count 2.

Conclusion

Defendants' joint motion to dismiss Count 2 is granted. Defendant Walid Khalife's motions to dismiss Count 2 based on lack of proof of requisite knowledge and lack of materiality are denied.

JUN 27 1995

Pursuant to Rule 77(d), Fed.R.Civ.P.
copies mailed this date to the
following parties:

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[21] In *Bosch*, the defendants were charged in part with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. 914 F.2d at 1241.

[22] That instruction provides that "[i]t is no defense to a conspiracy charge that success was impossible because of circumstances that the defendants did not know about. This means that you may find the defendants guilty of conspiracy even if it was impossible for them to successfully complete the crime that they agree to commit." Pattern Jury Instructions § 3.13.

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PATRICK J. DUGGAN
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. WALID KHALIFE; FRED ABDENOUR; GOLDCORP, INC., Defendants-Appellees. FADI KHALIFE; KHALIFE BROS.; JAMIL KHALIFE; RASHID ELIA, Defendants.	)	ORDER (Filed Apr. 24, 1997)

BEFORE: SILER and BATCHELDER, Circuit Judges; and CARR,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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*Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

(2)

Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

No. 97-149

In the Supreme Court of the United States

OCTOBER TERM, 1997

WALID KHALIFE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether a conspiracy to defraud the United States by hiding taxable income through acts of structuring financial transactions to avoid bank reports to the Internal Revenue Service (IRS) may be charged as a conspiracy "to defraud the United States" under 18 U.S.C. 371 absent proof that petitioners knew their conduct to be illegal.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 106 F.3d 1300. The opinion of the district court (Pet. App. 15-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1997. A petition for rehearing was denied on April 24, 1997. Pet. App. 42. The petition for a writ of certiorari was filed on July 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement, petitioners Khalife and Abdenour agreed to plead guilty to one count of conspiracy to defraud the United States, in violation

of 18 U.S.C. 371, but reserved their right to challenge the legal sufficiency of that count. Before accepting the guilty pleas, the United States District Court for the Eastern District of Michigan dismissed the conspiracy count. The court of appeals reversed. Pet. App. 1-14.

1. Count 2 of a multi-count indictment charged that, over a nearly four-year period ending in 1991, petitioners and others had conspired to defraud the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371.[1] The indictment alleged that petitioners had conspired to interfere with and obstruct the lawful government functions of the IRS by structuring their cash deposits into the accounts of petitioner Goldcorp, Inc., in amounts less than $10,000 to avoid bank reports to the IRS. The overt acts of the charged conspiracy consisted of hundreds of cash deposits into various Goldcorp, Inc., accounts. On each of the several days listed in the indictment, the conspirators made a total deposit of more than $10,000, broken down into lesser deposits, none exceeding $10,000. In total, the conspirators deposited $12,044,249.00 in cash during the course of the conspiracy. Of that amount, $9,233,549.00 involved multiple daily deposits totaling in excess of $10,000 per day that were structured in amounts of less than

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[1] The general conspiracy statute, 18 U.S.C. 371, provides in pertinent part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

$10,000 to avoid the bank's reporting requirement. Not once did the conspirators make an individual deposit of more than $10,000. Gov't C.A. Br. 2-5.

The indictment did not charge petitioners with a substantive offense under 31 U.S.C. 5322 (1988) and 5324(3) (1988), the anti-structuring provisions in effect at the time of petitioners' alleged conduct. Under this Court's decision in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), a criminal prosecution under those provisions would have required proof that petitioners knew their conduct to be illegal.[2] The government conceded that it could not prove that petitioners knew that it was illegal to structure transactions to evade the banks' reporting requirements. See Pet. App. 4, 18-19.

Petitioners moved to dismiss Count 2 of the indictment. Relying on *United States* v. *Curran*, 20 F.3d

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[2] At the time of the conduct at issue in this case, 31 U.S.C. 5324 (1988) prohibited so-called "structuring" activities—*i.e.*, conduct by which an individual "break[s] up a single transaction above the reporting threshold into two or more separate transactions [] for the purpose of evading a financial institution's reporting requirement." *Ratzlaf*, 510 U.S. at 136. A person "willfully violating" the structuring prohibition was subject to criminal penalties under 31 U.S.C. 5322 (1988). This Court held in *Ratzlaf* that a criminal conviction under Section 5322 required proof that the defendant knew his conduct to be unlawful. See 510 U.S. at 140-149.

After this Court's decision, Congress amended Section 5324 byadding a new 31 U.S.C. 5324(c), which establishes criminal penalties for any person who "violates" Section 5324, and which does not require proof of "willfulness." See Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253. Under Section 5324(c), knowledge of illegality is not an element of the structuring offense.

560 (3d Cir. 1994), petitioners argued that they could not be convicted of conspiracy to defraud the United States, based on their participation in structuring activities, without proof of the mental state necessary for the structuring offense itself. Pet. App. 18-19. Petitioners Khalife and Abdenour entered into a plea agreement with the government providing that, if the district court dismissed the conspiracy count and that dismissal were upheld on appeal, the government would dismiss all charges against those two petitioners. *Id.* at 2-3 & n.1. If the district court dismissed the count but it was reinstated on appeal, the plea agreement provided that petitioners Khalife and Abdenour would plead guilty to that count in exchange for dismissal of all other counts. *Ibid.* Petitioner Goldcorp and the government reached a settlement agreement contingent upon the guilty pleas of the other defendants. *Ibid.*

2. The district court granted petitioners' motion to dismiss Count 2 of the indictment. Relying on *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989), the court stated that petitioners could not properly be charged under the "defraud clause" of Section 371 (*i.e.*, conspiracy "to defraud the United States") if the underlying criminal conduct also constituted a violation of a "specific" criminal statute. Pet. App. 30-31. Because "the conduct which the government would rely on to prove [petitioners'] conspiracy to defraud" was, in the district court's view, covered by 18 U.S.C. 1001 (which prohibits the making of false statements to federal officials), the court held that petitioners could not be prosecuted under the defraud clause. Pet. App. 34. The court also stated that "a specific offense, namely 31 U.S.C. § 5324, was enacted to prohibit [petitioners'] conduct,"

and asserted that "[b]y charging [petitioners] under the broad 'defraud' clause of § 371, * * * the government, in effect, 'insulated' itself from having to prove an element of a crime that by its own concession, it cannot prove." *Id.* at 36. It observed as well that petitioners could not have been prosecuted for conspiracy "to commit any offense against the United States" (the "offense clause" of Section 371), because a prosecution under the "offense clause" requires proof that the defendant acted with the mental state necessary to commit the substantive offense itself. See *id.* at 35 (citing *United States* v. *Feola*, 420 U.S. 671, 686 (1975)).

3. The court of appeals reversed. Pet. App. 1-14. Relying on *United States* v. *Jackson*, 33 F.3d 866, 871-872 (7th Cir. 1994), cert. denied, 514 U.S. 1005 (1995), the court held that a conviction under the defraud clause of 18 U.S.C. 371 does not require proof that the defendant's conduct violated a substantive criminal statute. Pet. App. 7-9. Rather, the elements of a conspiracy to defraud the United States under Section 371 are "(1) an agreement to accomplish an illegal objective against the United States; (2) one or more overt acts in furtherance of the illegal purpose; and (3) the intent to commit the substantive offense, i.e., to defraud the United States." Pet. App. 7 (quoting *Jackson*, 33 F.3d at 872). The court concluded on that basis that "*Ratzlaf* intent does not apply to a § 371 conspiracy to defraud." *Id.* at 9.

ARGUMENT

The court of appeals held in this case that petitioners could be guilty of conspiracy to defraud the United States, based on their involvement in the "structuring" of financial transactions, even if they

did not act with the mental state necessary to sustain a conviction for the structuring offense itself. That decision is correct and is fully consistent with this Court's precedents. Although petitioners contend that the court of appeals' decision conflicts with the Third Circuit's resolution of the same issue, we do not believe that a square conflict exists. In any event, the practical significance of the question presented is limited to prosecutions for conduct that predated amendments to the anti-structuring laws enacted in 1994. Further review is not warranted.

1. Under Section 371, a defendant may be prosecuted either for (1) conspiracy to commit a specific substantive offense (the offense clause), or (2) conspiracy to defraud the United States (the defraud clause). The court of appeals in this case correctly recognized that those two different forms of conspiracy require different mental states. "[I]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *United States* v. *Feola*, 420 U.S. 671, 686 (1975). The defraud clause, by contrast, "reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Dennis* v. *United States*, 384 U.S. 855, 861 (1966). There is no requirement that the goal of a conspiracy to defraud the United States be a specific violation of a substantive statute. See *United States* v. *Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993) (under Section 371, "[n]either the conspiracy's goal nor the means used to achieve it need to be independently illegal"); *United States* v. *Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988) ("[S]ection 371's ban on conspiracies to defraud need

not involve the violation of a separate statute"), cert. denied, 488 U.S. 1011 (1989); see also *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910) (predecessor statute) ("The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government."); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924) (predecessor statute) ("To conspire to defraud the United States * * * also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.").[3]

If Congress had enacted two separate conspiracy provisions and placed them in different sections of the United States Code, there would be nothing surprising in the application of different mental state

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[3] Petitioners acknowledge that "a conspiracy to defraud need not necessarily contemplate a course of action or a result that violates a federal criminal statute—otherwise, the 'offense' and 'defraud' clauses of § 371 would be redundant." Pet. 21. Indeed, even under petitioners' theory, there would be no apparent barrier to a prosecution under the defraud clause of Section 371 if no federal anti-structuring statute existed. Petitioners' theory ultimately reduces to the implicit proposition that the anti-structuring laws have impliedly repealed the defraud clause as applied to conduct that involves the structuring of financial transactions. This Court has recognized, however, that to establish an implied repeal, "it is not enough to show that the two statutes produce differing results when applied to the same factual situation. Rather, the legislative intent to repeal must be manifest in the positive repugnancy between the provisions." *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979) (citation and internal quotation marks omitted). Petitioners have identified nothing in the text or history of the anti-structuring laws that establishes a "positive repugnancy" between those laws and the defraud clause of Section 371.

requirements for the two offenses. The analysis is not altered by the fact that Congress chose instead to proscribe two independent ways of violating Section 371. If petitioners had been charged with conspiracy to violate the anti-structuring statute, the government would have been required to prove that they acted with the mental state necessary, under *Ratzlaf*, to establish that offense. But since petitioners were charged with conspiracy to defraud the United States, the mental state required is simply the intent "of impairing, obstructing or defeating the lawful function of any department of Government." *Dennis*, 384 U.S. at 861.

2. Contrary to petitioners' contention (Pet. 15-19), the court of appeals' holding in this case is consistent with this Court's decision in *Bridges* v. *United States*, 346 U.S. 209 (1953). The defendants in *Bridges* were charged with, inter alia, conspiracy to defraud the United States. *Id.* at 212. The gravamen of the indictment was that the defendants had agreed that one of them should fraudulently petition for and obtain naturalization by making false statements to the naturalization court. *Ibid.* Because the indictment was brought after the expiration of the three-year general statute of limitations, the prosecution could go forward only if the running of the general statute of limitations had been suspended by the Wartime Suspension of Limitations Act. *Id.* at 215.

The Court held that the prosecution was barred by the statute of limitations, explaining that "the Wartime Suspension of Limitations Act applies * * * only where the fraud is of a pecuniary nature or at least of a nature concerning property." 346 U.S. at 215. The Court did not suggest that its construction of the Wartime Suspension of Limitations Act would

define the coverage of the defraud clause of Section 371. To the contrary, the Court distinguished its prior decisions in *Haas* and *Hammerschmidt* on the ground that "[t]he statements there made refer to conspiracies to defraud the United States 'in any manner or for any purpose' as used in the second clause of the general conspiracy section. They do not control the interpretation of the provisions in the Wartime Suspension of Limitations Act." *Id.* at 221 n.19 (citations omitted). Thus, as the Court subsequently recognized in *Dennis*, the decision in *Bridges* "did not turn upon construction of § 371," but rested instead upon the Court's interpretation of the Wartime Suspension of Limitations Act. 384 U.S. at 863.

The Court in *Bridges* also stated, as "[a] further ground for [its] conclusion," that the Wartime Suspension of Limitations Act and similar statutes had previously been construed as "limited strictly to offenses in which defrauding or attempting to defraud the United States is an *essential ingredient of the offense charged.*" 346 U.S. at 221. In concluding that that standard had not been met, the Court stated that the indictment's reference to the defraud clause of Section 371 "merely cloaks a factual charge of conspiring to cause, or knowingly to aid, Bridges to make a false statement." *Id.* at 224. Whatever the precise import of that statement, this Court has made clear that prosecution under the defraud clause is not rendered improper simply because the alleged fraudulent conduct may be covered by another criminal statute. See *Dennis*, 384 U.S. at 863-864 ("The fact that the events include the filing of false statements [punishable under 18 U.S.C. 1001] does not, in and of itself, make the conspiracy-to-defraud clause of § 371

unavailable to the prosecution."); see also pp. 6-7, *supra*.

3. Petitioners argue (Pet. 8-15) that the court of appeals' decision in this case conflicts with the decisions of the Third Circuit in *United States* v. *Curran*, 20 F.3d 560 (1994), and *United States* v. *Alston*, 77 F.3d 713 (1996). In *Curran*, the defendants were charged with "conspir[acy] to defraud the United States in violation of 18 U.S.C. § 371 by impeding the Federal Election Commission's performance through obstruction and interference with the Commission's reporting requirements, and by causing fictitious statements to be made on reports required to be sent to the Commission." 20 F.3d at 571. The court stated that "the instructions on intent as to the conspiracy count must track those applicable to the substantive counts." *Ibid.* In support of that conclusion, the Third Circuit cited *United States* v. *Feola* and a number of other cases involving conspiracy prosecutions brought under the *offense* clause of Section 371. See 20 F.3d at 571. In *Alston*, the court relied on *Curran* in holding that in a prosecution under the defraud clause of Section 371, based on the defendants' participation in structuring activities that predated the 1994 amendments to the anti-structuring laws, the government was required to prove that the defendant knew his conduct to be illegal. 77 F.3d at 719-721.

We do not believe that a square circuit conflict exists. The Third Circuit in *Alston* narrowly cabined its holding to the proposition that "[i]f the 'offense' clause of § 371 specifically covers an act or offense and the indictment charges only that act or offense as having been committed, and the proofs at trial reveal no more than such acts of offense, a defendant not guilty under the 'offense' clause cannot alternatively

be convicted under the broad 'defraud' clause of § 371." 77 F.3d at 721. It asserted that "the cases that have upheld convictions for conspiracy to defraud under § 371 have all involved additional charges in the indictment and additional evidence produced at trial, over and beyond that required for a conviction for pre-1994 structuring." *Ibid.* In the instant case, the court of appeals observed that the alleged conspiracy "implicated several crimes including mail fraud, money laundering, making and subscribing a false tax return, conspiracy to use a false writing, concealing and covering up material facts, and firearms violations." Pet. App. 10 n.4. It is therefore far from clear that petitioners could obtain relief even under the standard adopted by the Third Circuit.

In any event, the question whether a defraud clause prosecution based on structuring activities requires proof of knowledge of illegality is of rapidly diminishing importance. As amended in 1994, the criminal anti-structuring statute contains a prohibition that contains no element of willfulness, which was the element that this Court in *Ratzlaf* construed to require knowledge of illegality. See note 2, *supra*. Thus, the practical effect of the Third Circuit's holding in *Alston* is limited to prosecutions alleging pre-amendment conspiracies. See *Alston*, 77 F.3d at 717 n.12 (observing that "[i]n light of the 1994 amendment to § 5324, * * * the instant situation is unlikely to occur again.").

4. Petitioners contend that the significance of the court of appeals' decision "go[es] far beyond the admittedly limited group of pre-*Ratzlaf* 'structuring' cases that may be still be eligible for prosecution" because the decision "invites the criminalizing of a whole range of conduct which has not been legisla-

tively defined, and is neither unlawful nor otherwise wrongful." Pet. 23-24. That claim is without merit. The requirement that the defendant be shown to have entered into an agreement "for the purpose of impairing, obstructing or defeating the lawful function of any department of Government," *Dennis*, 384 U.S. at 861, provides assurance that defendants will not be subjected to criminal liability under the defraud clause of Section 371 for engaging in apparently innocent conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1997